

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

DAVID DEACON DITTER, #322174,

Petitioner,

v.

ACTION NO. 2:06cv237

GENE M. JOHNSON, Director of the
Virginia Department of Corrections,

Respondent.

FINAL ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254. The petition alleges violation of federal rights pertaining to Petitioner's conviction on May 14, 2003, in the Circuit Court of the City of Richmond, Virginia, for aggravated malicious wounding, use of a firearm, and attempted robbery. Petitioner received a total active sentence of thirty-three (33) years.

The matter was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C), Rule 72(b) of the Federal Rules of Civil Procedure and Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia for report and recommendation. The report of the magistrate judge was filed on December 28, 2006, recommending dismissal of the petition. By copy of the report, each party was advised of his right to file written objections to the findings and

recommendations made by the Magistrate Judge. On January 8, 2007, the Court received Petitioner's Objection. The Court received no response from Respondent.

The Court, having reviewed the record and examined the objections filed by Petitioner to the Magistrate Judge's report, and having made de novo findings with respect to the portions objected to, does hereby ADOPT AND APPROVE the findings and recommendations set forth in the report of the United States Magistrate Judge filed on December 28, 2006, and it is, therefore, ORDERED that the petition be DENIED AND DISMISSED and that judgment be entered in favor of Respondent.

Accordingly, the Court DENIES claim one (1) of the petition as it is procedurally defaulted because it was not raised on direct appeal and thus was not fairly presented to the Supreme Court of Virginia; and the Court DENIES claims two (2) and (3) of the petition as Petitioner failed to show either that the state court unreasonably determined the facts in his case or that the state court unreasonably applied federal law in dismissing these claims.

Petitioner may appeal from the judgment entered pursuant to this final order by filing a written notice of appeal with the Clerk of this Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510, within thirty (30) days from the date of entry of such judgment. Petitioner has failed to demonstrate "a substantial showing of the denial of a constitutional right."

Therefore, the Court, pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, declines to issue a certificate of appealability. See Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003).

The Clerk shall mail a copy of this Final Order to Petitioner and to counsel of record for Respondent.

/s/

Rebecca Beach Smith

Norfolk, Virginia

February 21, 2007